A significant overhaul of parts 5 and 5A of the Rules of the Supreme Court of Virginia goes into effect on July 1, 2010. Overall, the changes make the rules clearer, but the changes will certainly require some adaptation.

Below is a quick overview, with an emphasis on changes having the most practical impact on the practice of appellate law. Fans of extraordinary writs and other exotica will have to parse those rules unassisted. Unless otherwise noted, citation to the rules refers to the new rule.

What stays the same

First, the most significant deadlines stay the same. For example, the notice of appeal is still due in 30 days, Rule 5:9(a); Rule 5A:6(a). Second, the colors of briefs and appendices do not change: white for the appellant’s opening brief, blue for the appellee’s brief, the joint appendix cover is red, and so on. Rule 5:31; Rule 5A:24. Although some rule numbers are adjusted, the numbers stay the same for the most often quoted rules. Thus, the procedural default rule stays at 5:25 and 5A:18.

Changes to the rules for both the Supreme Court of Virginia and the Court of Appeals of Virginia

In making assignments of error, counsel will now be required, consistently current practice in the Court of Appeals of Virginia, to specify “[a]n exact reference to the page(s) of the transcript . . . or record where the alleged error has been preserved.” Rule 5:17(c)(1); Rule 5A:20(C).

The rules now expressly permit citation to unpublished dispositions. If the opinion is not widely available, a copy must be attached to the brief. Rule 5:1(f); Rule 5A:1(f).

Previously, motions for extension of time, where permitted at all, required a showing of “some extraordinary occurrence or catastrophic circumstance which was unpredictable and unavoidable.” See Current Rule 5:5(a); Rule 5A:3(a). The new rule more modestly asks for a showing of “good cause sufficient to excuse the delay.” Rule 5:5(a); Rule 5A:3(a).

Rules 5:17(c)(1) and 5A:20(a) previously required that case citations in the petition for appeal include both the Virginia reports and the Southeastern Reporter. That requirement is now dropped from the text of the rule.

The old requirement that counsel use certified mail, with a required receipt, is now one of several options. As in federal practice, after July 1 mailings can sent via commercial carriers like UPS and FedEx. Rule 5:5(c); Rule 5A:3(d).

In a codification of existing practice, amicus briefs are now expressly permitted at any stage. Rule 5:30(a); 5A:23(a).

Another codification of existing practice is the prohibition on incorporating arguments by reference. Rule 5:26(g); Rule 5A:19(e).

For criminal cases, the rules now specifically cover Anders briefs, briefs that must be filed in criminal cases when the client wishes to appeal, but counsel is not aware of any merititious issues. Rule 5:17(h); Rule 5A:12(h).

Changes specific to the Supreme Court of Virginia

Change your template: the “questions presented” requirement is gone. Assignments of error, of course, are still required, with the same fatal consequences if omitted. Rule 5:17(c).


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Message from the Chair

The newsletter you’re reading is the first of its kind. The VBA’s newest section is launching a series of reports to its members to report on news, notes, practice pointers, and other matters of interest to those who practice in the appellate courts. This first issue will go out to all VBA members; if you’d like to continue receiving these in the future, just let the VBA staff know to add you to the section’s roster.

For now, in addition to the several timely articles you’ll find in this issue, there are plenty of appellate developments to report. For the first time in at least a generation, the Supreme Court has adopted a comprehensive set of revisions to Parts 5 and 5A of the Rules of Court, effective July 1, 2010. If you practice in the state appellate courts, you’ll need to know about these changes for the first brief or motion you file after that date. Check Steve McCullough’s article in this issue for a summary of some of the key changes.

If you’re attending the VBA’s summer program in Hot Springs, be sure to listen in on the program that the Appellate Practice Section is co-sponsoring; it’s a hot-off-the-presses review of the most important decisions from the United States Supreme Court’s October 2009 Term, which will conclude barely three weeks before the date of this program. The panel discussion will feature nationally-recognized experts in Supreme Court jurisprudence. If you want to know right away what this year’s Iqbal will be, plan to be there from 2:00 to 3:30 on Friday, July 23.

Our section’s plans for this year include co-sponsoring (with the State Bar’s Appellate Practice Committee) the second Virginia Appellate Summit in the fall. This is a wonderful opportunity to interact with others who are interested in our craft, and maybe to rub elbows with an appellate jurist or two. We will, of course, offer CLE opportunities for those who attend. Down the road, we’re contemplating putting together a Fourth Circuit practice manual and periodic CLE programs that focus on appellate issues.

You aren’t required to be a section member to attend either the program in Hot Springs or the summit, but please consider joining us; section dues are just $25 per year. You don’t have to be an appellate practitioner to join. All you need is an interest in appellate practice, and a willingness to share some of your time with your colleagues. Your involvement can be as deep as you wish; as we all know, the more you put into something like this, the more you’ll get out of it.

One last word about appellate practice itself: I have mused elsewhere that when you undertake to handle a trial, you have the opportunity to correct an injustice. When you take on an appeal, you can correct a thousand injustices, including many that won’t arise until long after you’re gone. When you address an appellate court, what you say and do matters to more than seven million people. If that idea intrigues you, come on aboard; we’ll be happy to have you.

L. Steven Emmert, Appellate Practice Section Chair
Sykes, Bourdon, Ahern & Levy
Virginia Beach
The issue waiver doctrine, or procedural default rule, provides that courts will deem issues unveiled for the first time on appeal waived. This "general rule" further provides that appellate courts will not entertain issues omitted from the appellant's opening brief even if the parties argued the issue at trial. According to one court, the rule is so embedded in federal appellate jurisprudence that courts "have invoked it with a near-religious fervor." And to many, the rule animates the central tenet of the American adversarial system—that trained advocates will present their clients' case to impartial decision makers who will then decide the matter based on the facts and arguments submitted. A Justice of the Supreme Court observed that the principle "is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." Accordingly, courts are discouraged from considering arguments not made by the parties and generally follow the "principle of party presentation," lest they be accused of engaging in so-called "issue creation" or "sua sponte decision making." Yet, while the general rule provides that courts may only decide cases based on the facts and legal arguments presented by the parties, what are courts to do if parties, either intentionally or by mistake, fail to raise key issues or argue inappropriate legal principles and doctrine? Shall the court proceed to resolve the parties' dispute based on an erroneous presentation of the law? Shall it decide a sweeping constitutional issue when a narrower non-constitutional ground is available? Shall it not consider an issue when doing so would work an injustice? In such circumstances, courts have proved their willingness to depart from the general rule and decide cases on grounds not raised or argued by the parties. While the practice of departing from the general rule is often criticized, one judge extolled the practice as a hallmark of judicial greatness, saying "[d]espite much pretense to the contrary by judges and lawyers, it is one of the marks of the great judge to recast the issues in cases in his own image." Furthermore, there is little validity to the argument that the courts' practice of exercising discretion to raise issues and frame cases is often serves to restrict judicial power. Nonetheless, the debate between the members of the Snyder panel illustrates concretely the public and institutional debate over the proper use of issue waiver and, by extension, the proper role of the federal appellate courts. Using the Snyder polemic as context, this article will explore briefly the competing visions of federal appellate court discretion underlying the debate between the Snyder majority and concurrence. As the case illustrates, these visions conflict when courts attempt to serve as impartial and passive decisionmakers on the one hand, while dispensing with their constitutional obligation to articulate and draft a consistent body of law on the other. The article concludes that important considerations of accuracy, judicial independence, and consistency militate in favor of the appellate courts' practice of exercising discretion to raise issues and frame cases in "their own image." Furthermore, there is little validity to arguments that appellate courts impermissibly expand their power by deviating from the party presentation principle; in fact, the practice often serves to restrict judicial power. Nonetheless, while it is prudent for federal appellate courts to exercise discretion and raise issues sua sponte, it is equally important that courts exercise this discretion in limited instances where important questions are involved to preserve the core interests reflected in the party presentation principle—litigant and societal respect and acceptance of decisions rendered by the courts.

The Snyder Majority: Issue Waiver as a Mandatory Doctrine

In Snyder, the Fourth Circuit considered the propriety of a jury verdict rendered against Fred Phelps and members of the Westboro Baptist Church. Snyder filed the case after the defendants held a protest during his son's funeral—Snyder's son was a Marine Lance Corporal who lost his life in Iraq. The verdict was based on three state law torts: invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress and civil conspiracy. At the trial, the defendants pressed several defenses, including that the First Amendment of the Constitution categorically protected their speech. Similarly, in National Assoc. of Social Workers v. Harwood, the court considered the question of whether the defendants were entitled to legislative immunity even though they neglected to raise the issue before the district court. The Fourth Circuit is no exception. For instance, the court in Dickerson v. United States, sua sponte questioned whether 18 U.S.C. § 3501 abrogated Miranda v. Arizona despite the parties' refusal to brief and argue the question.

If anything, these examples demonstrate that despite sweeping rhetoric that the general rule of issue waiver is an inexcusable command, its application is a matter of appellate court discretion. Yet, confusion arises because courts have failed to articulate or follow any consistent principle in exercising this discretion. The Fourth Circuit confronted this confused area of appellate jurisprudence in Snyder v. Phelps, where a divided panel of the Fourth Circuit vigorously argued the question of whether or not to apply the issue waiver doctrine in a case presenting important First Amendment questions.

The dialectical exchange between the members of the Snyder panel illustrates concretely the public and institutional debate over the proper use of issue waiver and, by extension, the proper role of the federal appellate courts. Using the Snyder polemic as context, this article will explore briefly the competing visions of federal appellate court discretion underlying the debate between the Snyder majority and concurrence. As the case illustrates, these visions conflict when courts attempt to serve as impartial and passive decisionmakers on the one hand, while dispensing with their constitutional obligation to articulate and craft a consistent body of law on the other. The article concludes that important considerations of accuracy, judicial independence, and consistency militate in favor of the appellate courts' practice of exercising discretion to raise issues and frame cases in "their own image." Furthermore, there is little validity to arguments that appellate courts impermissibly expand their power by deviating from the party presentation principle; in fact, the practice often serves to restrict judicial power. Nonetheless, while it is prudent for federal appellate courts to exercise discretion and raise issues sua sponte, it is equally important that courts exercise this discretion in limited instances where important questions are involved to preserve the core interests reflected in the party presentation principle—litigant and societal respect and acceptance of decisions rendered by the courts.

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used by the court in *Cavallo* implies that due process interests are at stake and a strict application issue. The majority is justified on grounds that a party may be deprived of notice and a meaningful opportunity to be heard if a court decides a case on grounds not briefed.58

Additionally, interests of judicial efficiency and practical wisdom provide support for the general rule. Courts foster democratic and participatory values by allowing parties to fully participate in the adjudication of their case. Indeed, a litigant who feels he was provided a full and fair opportunity to litigate his claims is more likely to accept the results, favorable or not.59 In addition, the rule provides parties an incentive to fully litigate their case and not strategically conceal legal arguments in hopes of catching their adversary off-guard. As one court reasoned, “it would not be quite cricket”60 to decide a case on an issue a party raised at the eleventh hour because the opposing party may have been lulled into presenting his case differently. Furthermore, by forcing litigants to present all relevant legal issues and arguments, the rule increases the likelihood that a court will decide the case based on a fully developed record, thus encouraging a more complete and timely decision.

Certainly, the *Snyder* majority’s ruling is not without precedential and policy support, as it promotes the party participation principle and the adversary model of adjudication. But, as “[a] foolish consistency is the hobgoblin of little minds,”61 so is the mechanical application of a rule of law the incubus of inequitable and imprudent results. As demonstrated by Snyder, in reviewing the case as presented by the parties and bypassing a narrow and ordinary state law issue, the majority may have unnecessarily decided a broad and complex First Amendment question; thus violating an important canon of constitutional jurisprudence designed to limit judicial encroachment upon democratic interests.62

The *Snyder* Concurrence: Issue Waiver as a Discretionary Principle

In his concurrence, Judge Shedd argued that the majority erred by proceeding to the current question when the trial court’s decision could be reversed on grounds that the plaintiff failed to offer sufficient evidence to support his state law claims at trial.63 He pointed out that “[u]nder the doctrine of constitutional avoidance, we are to avoid constitutional determinations when other grounds exist for the disposition of the case.”64 In his view, the waiver doctrine must yield to this prudential doctrine of constitutional interpretation. And he pointedly disagreed with the majority’s ruling that the general rule of issue waiver is absolute, stating that “[o]ur judicial power to decide a case is not limited by

The arguments and actions of the parties.65

This flexible reasoning reflects the greater weight of authority and a sounder view of federal appellate court power. Indeed, the Supreme Court has expressly declared that the courts of appeal possess the authority to resolve questions not presented by the parties, as well as issues raised for the first time on appeal.66 While declining to announce a general rule to define the scope of this discretion, the Court has said that, “[c]ertainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where injustice might otherwise result.” Signaling its recognition of a broader authority, it further noted that “[t]he examples are not intended to be exclusive.”67

Fourth Circuit precedent demonstrates that the court has recognized and applied this power. For instance, it stated, “in very limited circumstances we may consider [an issue raised for the first time on appeal] if the error is "plain" and our refusal to consider it would result in a miscarriage of justice.”68 And in another case the court said, “[t]he normal rule of course is that failure to raise an issue for review in the prescribed manner constitutes a waiver. But the rule is not an absolute one and review may proceed (even completely sua sponte) when the equities require.”69 Furthermore, in *Dickerson v. United States*, a case concerning whether a defendant’s statement to the police should be suppressed, the Fourth Circuit sua sponte considered whether a federal statute enacted in 1968, 18 U.S.C. § 3501, overruled *Miranda* and established a more lenient standard for the admission of confessions. For three decades, the federal government had a policy of not relying on the statute because it viewed the provision as unconstitutional, but argued only that the defendant’s confession should be admitted into evidence because the defendant waived his *Miranda* rights before confessing to the crime. Despite the government’s refusal to argue the issue, the Fourth Circuit sua sponte raised the question and found that § 3501 was constitutional and had displaced *Miranda*.70

The existence of judicial discretion to frame and decide cases on its own terms is a necessary dimension of the federal appellate court's responsibility to "say what the law is." While Article III of the Constitution fails to explicitly define the precise role of the judiciary, several principles derived from the article support the exercise of judicial power to craft cases in a way consistent with the manner in which they are presented to the parties. Since *Marbury v. Madison*71 and the advent of modern judicial review, an essential function of the federal judiciary has been to announce publicly not only the winner of a particular case, but also the meaning of the law as
applied to that case, which in turn provides guidance to the public on how the law will apply in future cases.

In those cases where the parties fail to accurately and completely describe applicable legal doctrine or abandon a viable argument presented before the trial court, the court’s duty to follow the party presentation principle collides with its duty to announce an accurate uncolored rule of law. Indeed, as judicial decisions are objective statements describing the meaning of law, and not statements concerning the subjective view of the law taken by litigants, courts must be able to sua sponte take notice of issues and legal principles either mistakenly or intentionally omitted by the parties. As one commentator aptly noted: “If litigants could constraining courts through their own truncated or inaccurate depictions of the meaning of statutes, constitutional provisions, and the like, they could effectively wrest this task away from the courts, putting federal judges in the impoverished role of picking and choosing from among the litigants’ interpretations of the law, rather than their own.”

Additionally, Article III’s requirement that courts decide only actual cases or controversies may be violated in the absence of judicial discretion to consider issues not raised by the parties. A judge of the Court of Appeals for the District of Columbia Circuit recognized this danger in Independent Insurance Agents of America, Inc. v. Clarke. I think it most apparent that federal courts do possess [the power to raise issues sua sponte]. The alternative is that the parties could force a federal court to render an advisory opinion. What the dissenters in effect argue is that the parties can stipulate to the state of underlying law; frame a law suit, assuming that stipulation; and obtain from the court a ruling as to what the otherwise dispositive law would be if the stipulated case were in fact the law. Indeed, that is precisely what would have occurred in this case had the panel not, sua sponte, raised the question . . .

In its review of the case, the Supreme Court agreed with this position saying, “[t]he contrary conclusion would permit litigants, by agreeing on the legal issue presented to the court, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory.”

The practice is also justified as a means of protecting the integrity of the courts and their independence. It is important that the courts not cede their authority as independent decision makers to parties whose litigation agenda may be in conflict with the court’s responsibility to provide an accurate and narrowly tailored articulation of the law. For instance, a party may decline to argue a particular line of legal reasoning because of a political agenda. An example of this is *Gonzales v. Carhart*, where the Planned Parenthood Federation of America chose not to argue that the federal statute at issue was an unconstitutional regulation of interstate commerce, even though several justices indicated they were receptive to the argument, presumably because the organization supported a broad interpretation of Congress’s commerce power. Special interest groups, as well as state and federal governments, will often avoid citing and relying on legal doctrines they dislike or lines of precedent they hope will be overturned. In these instances, courts should have the discretion to consider issues and arguments not presented by the parties, because otherwise litigants will gain control over an essential judicial function.

What is more, litigants may seek to use the courts as vehicles to make maximalist constitutional declarations that promote countermajoritarian values. Courts generally favor incremental and measured steps to sweeping declarations of constitutional norms because broadly worded opinions undermine legislative processes, lead to unintended consequences, and put in place rigid rules that provide little flexibility for deciding future cases. Adherents of this maximalist judicial philosophy advocate a modest role for the courts out of a belief that the majority of public policy decisions should be made by the political branches of government. Some litigants, however, mistrust the political branches and turn to the courts seeking opinions that will define the scope of their constitutional rights in the broadest possible terms.

Because their goal may be to have a court issue a sweeping constitutional ruling to further their views, these litigants have an incentive to omit arguments based on narrower, less controversial, grounds. The constitutional avoidance doctrine counsels against allowing litigants to frame their case in this manner. The doctrine reflects a prudential institutional practice implemented by the federal judiciary to refrain from making broad constitutional pronouncements that place the courts in conflict with democratic institutions. Litigants, however, often do not share the judiciary’s interest in avoiding such conflicts, and may turn to the courts to bypass democratic processes. As appellate litigation has become as much about setting precedent and guiding policy as actually deciding individual disputes, courts should have the discretion to reach beyond the arguments made by the parties to narrow the scope of their decisions and avoid unnecessary constitutional rulings that strike down legislative actions.

The *Snyder* concurrence embraced this rationale in arguing that the court should look to whether a decision could be reached on state grounds before proceeding to the First Amendment issue advanced by the defendants. Surely, it is not unreasonable to suspect that the defendants in *Snyder* — many of whom are attorneys and have a far reaching political and social agenda — may have intentionally omitted certain arguments on appeal in hopes of inducing the Fourth Circuit into rendering a broad First Amendment ruling. A ruling they could use not only as a shield to avoid liability in the instant case, but also as a sword to strike down state and federal statutes that might limit their ability to protest military funerals in the future. Accordingly, it is wise for courts to possess and exercise discretion to go beyond the four corners of the litigant’s briefs, otherwise litigants may be encouraged to manipulate the court’s interpretive function and force courts to decide sweeping constitutional questions when a more conservative and less divisive methodology is available.

**Defining the Scope of Appellate Discretion to Disregard the General Rule**

As the *Snyder* majority found, federal courts generally follow the praxis of ignoring issues not raised by the parties, however, the underlying duty of federal courts to accurately pronounce objective rules of law based on actual controversies and to avoid unnecessary constitutional decisions, militate against the majority’s holding that courts are “obligated” to strictly apply the issue waiver doctrine. While it is wise to restrict courts to deciding cases based strictly on the issues and legal arguments of the parties, it is equally unwise for courts to exercise discretion carte blanche and ignore completely the party participation principle. And it is the indeterminate phrasing of the exception that often leads to confusion of the bounds of appellate discretion. In the Fourth Circuit, for example, the court has said that it may only depart from the party presentation principle when “the equities require” or when “refusal to consider [the Continued next page
question] would result in a miscarriage of justice.” While the Supreme Court has expressed its unwillingness to state a specific rule, the decisions of other courts of appeal provide some clarity on the appropriate scope of discretion.

Courts have uniformly ruled that they may depart from the general rule to examine subject matter jurisdiction and standing, as these questions concern the court’s capacity to hear a case. Courts have also departed from the general rule when the issue is purely legal in nature, and lends itself to satisfactory resolution on the existing record without further development of the facts. Issue creation may also be warranted when questions of constitutional magnitude are involved—this would include instances where the doctrine of constitutional avoidance would apply. Courts may also sua sponte decide to reexamine a precedent or doctrine so deeply entrenched in the law that a litigant might not think to challenge it. A court may also ignore the rule when the omitted argument is “highly persuasive, a circumstance that often inclines a court to entertain a pivotal argument for the first time on appeal, particularly when declining to reach the omitted argument threatens a miscarriage of justice.” Federal courts also look to whether consideration of an omitted issue will prejudice the appellee and deprive him of an opportunity to respond, as well as whether the appellant’s omission was entirely inadvertent rather than deliberate. Lastly, courts will consider omitted issues of great public importance. These are questions touching upon policies such as federalism, comity, and respect for the independence of democratic institutions.

These rulings provide some guidance on the bounds of appellate discretion to create issues and depart from the general rule. Many of these cases point out, however, that discretion to depart from the general rule is highly circumscribed and warranted only in extraordinary circumstances. Otherwise, courts may be left open to allegations that they have created issues and crafted rulings to accord with their personal preferences and political views.

Conclusion

Consistent application of the general rule of issue waiver remains the norm in our adversarial system, as the rule fosters important and worthwhile systemic ends. The general rule may not be dismissed as an insignificant technicality or a trap for the indolent, as the rule animates our adversarial system and promotes fairness and judicial economy. Nevertheless, the Snyder majority’s formulation of the rule as an important and its decision that the important policies inherent in the constitutional avoidance doctrine must yield to the general rule of issue waiver is inapposite to the greater weight of Supreme Court and Fourth Circuit precedent and the general policies effectuated by the existence of an exception to the general rule.

The concurrence correctly identified that the court possessed the authority to consider issues not raised by the parties and its argument that the court should have considered an issue not raised by the parties in an effort to avoid a ruling on constitutional grounds is convincing. Indeed, such discretion permits the federal appellate courts to perform their essential function as both arbiters of disputes and objective interpreters of law. Nonetheless, while appellate courts possess discretion to reach issues not argued, such discretion should be affirmatively exercised only in extraordinary cases where the equities preponderate in favor of such a step.

Notes

1) Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.")
2) Bird v. Household Mfg., 484 U.S. 528, 532, n. 3, (1988) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court’s discretion").
4) See, e.g., Cavallo v. Star Enter., 100 F.3d 1150, 1152 n. 2 (4th Cir. 1996).
8) Grace v. United States, 128 S. Ct. 2559, 2564 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").
9) See Milani et al., supra note 5, at 247-48.
11) 304 U.S. 64 (1938).
12) 47 U.S. 1 (1842).
16) Ex parte Young, 209 U.S. 123, 159 (1908).
18) 69 F.3d 622 (1st Cir. 1995).
22) Id. at 210.
23) Id. at 211.
24) Id. at 210.
25) Id. at 212-13.
26) Id. at 216.
27) Id. The Thomas Jefferson Center for the Protection for Free Expression raised the issue in its amicus curiae brief.
28) Id. at 216-17.
29) Id. at 217.
30) Id.
31) 67 F.3d 517 (4th Cir. 1995).
32) Id. at 522 n. 8.
33) 100 F.3d 1150 (4th Cir. 1996)
34) Id. at 1152 n. 2.
36) See Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, Inc., 695 F.2d 524, 527 (11th Cir. 1983) (“Even if its claim ultimately has no merit, a party who brings a claim in good faith has a due process right to litigate that claim . . . sua sponte dismissing the case failed to give Wometco its due process rights to file a written response, present its arguments at a hearing, and amend its complaint.”); Frost, supra note 12, at 549.
38) Ralph Waldo Emerson, Self Reliance, in Essays: First Series (1841).
39) This article takes no view on whether the court should have reversed the district court based on insufficiency of the evidence. It only suggests that the court should have at least considered the question before moving to the First Amendment issues.
40) Snyder, 580 F.3d at 226 (Shedd, J. concurring in judgment).
41) Id. at 227.
42) The doctrine of constitutional avoidance was introduced by Justice Brandeis in his concurring opinion in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). There, Justice Brandeis said, "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Id. at 347.
43) Snyder, 580 F.3d at 228.
45) Id.
46) Id. at n. 8.
50) 695 F.2d 524, 527 (11th Cir. 1983).
head of judicial review, but also furnishes the canonical statement of the necessary and appropriate role of courts in the constitutional scheme.”).
50) Frost, supra note 16, at 472.
52) Id. at 1078 (Sentelle, J., concurring).
54) 127 S. Ct. 1610 (2007).
55) See id. at 1640 (Thomas, J. concurring) (“I also note that whether the Act constitutes a permissible exercise of Congress’ power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.”).
59) See Erwin Chemerinsky, Federal Jurisdiction 258 (3d ed. 1999); 56 F.3d 1215 (1st Cir. 1992).

60) See United States v. La Guardia, 902 F.2d 1010, 1013 (1st Cir. 1990).
61) Id.
62) See Amoco Oil Co. v. United States, 234 F.3d 1374, 1378 (6th Cir. 1980).
63) See Hartmann v. Prudential Ins. Co. of Am., 9 F.3d 1207, 1215 (7th Cir. 1993).
64) See United States v. Krolicki, 689 F.2d 289, 291-92 (1st Cir. 1982).
65) See Nat’l Ass’c of Social Workers, 69 F.3d 622, 628 (1st Cir. 1995).

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Rule Changes
Continued from cover

Appellate Practice Section programs at the 2010 VBA Summer Meeting The Homestead, Hot Springs

Friday, July 23, 2:00-3:00 P.M.
“The Roberts’ Court at Age Four: The 2009 U.S. Supreme Court Term In Review.”
A presentation featuring former Solicitor General Paul Clement.
(1.5 CLE credits)

Saturday, July 24, 9:00-10:30 A.M.
“12th Annual Review of Civil Decisions of the Supreme Court of Virginia.”
A presentation by Judge Jane Marum Rouss.
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I’m So Confused

By J.R. Zepkin

In Super Fresh Food Markets of Virginia, Inc. v. Ruffin 263 Va. 555 (2002), the Supreme Court of Virginia explained when the 21 day period under Rule 1:1 starts and when it may be extended. This is important for appellate practitioners because the mechanics of determining the beginning of the 30 day period for filing a Notice of Appeal to either appellate court is the same. Super Fresh had its appeal dismissed for failing to file a Notice of Appeal on time. The core issue in Super Fresh, and in a number earlier cases, was when is an order a final judgment, engaging the beginning of the 21 (and 30 day) periods.

In Super Fresh, the Supreme Court held that if it is a final order, than the running of the 21 day clock (and inferentially, the 30-day clock) can be interrupted in only three ways: modification, vacation or suspension. Any other method, such as a later order reserving jurisdiction over the case is not effective.

The court delineated an easy to understand rule for determining if the order you’re interested in is a final order. Justice Koontz wrote for the court:

[When a trial court enters an order, or decree, in which a judgment is rendered for a party, unless that order expressly provides that the court retains jurisdiction to reconsider the judgment or address other matters still pending in the action before it, the order renders a final judgment and the twenty-one day time period prescribed by Rule 1:1 begins to run.]

If a circuit court renders judgment for a party and there is nothing in the order to suggest that the court is retaining jurisdiction, the 21-day period, as well as the 30-day period for filing a Notice of Appeal, will begin to run. The only way either time clock can be interrupted is by the trial judge, within the 21 day period, modifying, vacating or suspending that order. No other mode will work.

The holding in City of Suffolk v. Lummis Gin Company, 278 Va. 270 (2009), in an opinion again by Justice Koontz, raises questions about Super Fresh’s reliability.

An issue in Lummis was a dispute over whether a motion for a non suit was for a first [of right] or a second non suit. The judge entered an order on February 12, 2008 granting the City’s motion for a non suit without prejudice and the same order further recited “this suit shall remain on the docket for the Court to determine issues concerning attorneys’ fees, costs and expense incurred by the Baker heirs.” The defendants contended it was a second non suit and that the court was thus empowered to award these expenses as a condition of granting the non suit.

The judge later held a hearing and ultimately on September 09, 2008, entered an order finding that it was a second non suit and awarded the various costs sought. The City appealed. The Supreme Court held that the February 02, 2008 order was a final judgment and that after 21 days from its entry, the trial court no longer had any authority to make an award. The Supreme Court cited an earlier case, James v. James 263 Va. 474 (2002) for its holding in Lummis that an order granting a non suit is a final Rule 1:1 order, even if there were pending motions for consideration by the court.

While the Lummis opinion cites Super Fresh, it does not explain why the February 02, 2008 order in Lummis was a final order when the judge included in that order the matter was to remain on the court’s docket for the court to decide other issues that were pending.

We are left with the question: how did the Lummis February 08, 2008 order fail to “expressly provide[,] that the court retains jurisdiction to reconsider the judgment or address other matters still pending in the action before it,” under Super Fresh, rendering it a non final order. One suggestion offered is that the only way to prevent the order from being a final Rule 1:1 order is to use the express language in Super Fresh that the court retains jurisdiction to reconsider the judgment or address other matters still pending in the action before the court. Alternatively, one could avoid this sinkhole by asking the court to suspend the order until further notice of the court.

Unless one of our readers has an explanation that reconciles the Super Fresh and Lummis cases, it appears that our period of clarity has taken a walk. Remaining questions that I can think of are: (i) will only the language quoted above from Super Fresh, "...retains jurisdiction to reconsider..." operate to prevent the order from being a final judgment; (ii) does the Lummis holding apply only to non suit orders; and (iii) is the SCV backing off from the language in Super Fresh?

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